



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 17, 2012

Ms. Lisa D. Mares
Taylor Olson Adkins Sralla Elam, L.L.P
6000 Western Place, Suite 200
Fort Worth, Texas 76107-4654

OR2012-05488

Dear Ms. Mares:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 450817.

The City of Richland Hills (the "city"), which you represent, received a request for an executed mediation agreement in litigation or contemplated litigation currently pending between the city and a named individual, any documents related to the mediated settlement agreement, any recordings of exchanges between the parties on the matter, and copies of any related depositions. You state the city does not have any information responsive to the request for any recordings of exchanges between the parties or any related depositions.¹ You state the city will release some of the requested information to the requestor. You also state the city will redact personal email addresses of members of the public under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009), personal information of current and former employees subject to section 552.117 of the Government Code as permitted by section 552.024(c) of the Government Code, information related to a driver's license or personal identification document under section 552.130 of the Government Code, and social security numbers under section 552.147 of the Government

¹The Act does not require a governmental body to release information that did not exist when it received a request or to create responsive information. *See Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

Code.² You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.107, and 552.111 of the Government Code.³ We have considered the exceptions you claim and reviewed the submitted representative sample of information.⁴ We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we must address the requestor's assertion that the city did not comply with section 552.301 of the Government Code in requesting this decision. Section 552.301 prescribes procedures a governmental body must follow in asking this office to determine whether requested information is excepted from public disclosure. *See id.* § 552.301(a). Section 552.301(b) requires the governmental body to ask for the attorney general's decision and state the exceptions to disclosure that it claims not later than the tenth business day after the date of its receipt of the written request for information. *See id.* § 552.301(b). Section 552.301(e) requires the governmental body to submit to this office, no later than the fifteenth business day after the date of its receipt of the request, (1) written comments stating why the governmental body's claimed exceptions apply to the information at issue; (2) a copy of the

²We note this office issued Open Records Decision No. 684, a previous determination to all governmental bodies, which authorizes the withholding of ten categories of information, including e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision. Section 552.117 of the Government Code excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body. Gov't Code § 552.117(a). Section 552.024 of the Government Code authorizes a governmental body to withhold information subject to section 552.117 without requesting a decision from this office if the current or former employee or official chooses not to allow public access to the information. *See id.* § 552.024(c). Section 552.130(c) authorizes a governmental body to redact, without the necessity of requesting a decision from this office, a motor vehicle operator's or driver's license or permit issued by an agency of this state, or another state or country, and a personal identification document issued by an agency of this state, or another state or country, or a local agency authorized to issue an identification document. Gov't Code § 552.130(c); *see id.* § 552.130(d) (entitling requestor to appeal governmental body's decision to withhold information pursuant to section 552.130(c) to attorney general), .130(e) (requiring governmental body that withholds information pursuant to section 552.130(c) to provide notice to requestor). Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act. *See id.* § 552.147(b).

³Although you raise section 552.101 of the Government Code in conjunction with the attorney-client privilege under Texas Rule of Evidence 503, this office has concluded that section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Further, we note the proper exception to raise when asserting the attorney-client privilege for information not subject to section 552.022 of the Government Code is section 552.107 of the Government Code. *See* ORD 676 at 1-2.

⁴We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different information than those submitted to this office.

request for information; (3) a signed statement of the date of the date of the governmental body's receipt of the request or evidence sufficient to establish the date of receipt; and (4) the specific information the governmental body seeks to withhold or representative samples if the information is voluminous. *See id.* § 552.301(e)(1)(A)-(D).

The city informs us that, after receiving the present request for information on January 25, 2012, the city requested clarification from the requestor on February 8, 2012, and received the requestor's response on February 13, 2012. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information). In *City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010), the Texas Supreme Court held that when a governmental body, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed. *See id.* at 384. Taking February 13, 2012, the date of the city's receipt of the requestor's response to its request for clarification, as the date of the city's receipt of the present request for information, the city's communications with this office were timely for purposes of section 552.301 of the Government Code. In this instance, however, the requestor contends the city did not act in good faith in seeking clarification of the request. Whether the city acted in good faith in requesting clarification is a question of fact. This office cannot resolve factual issues in the decisional process. *See* Open Records Decision Nos. 592 at 2 (1991), 552 at 4 (1990), 435 at 4 (1986). Where fact issues cannot be resolved as a matter of law, we must rely on the facts alleged to us by the governmental body that is requesting our decision or on those facts that are discernible from the documents submitted for our inspection. *See* ORD 552 at 4. Having considered the city's representations and documentation, we cannot conclude the city failed to act in good faith in requesting clarification. Thus, the city complied with section 552.301 of the Government Code in requesting this decision, and we will consider its claims for the submitted information.

Section 552.107(1) of the Government Code protects information that comes within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. *See* TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *See In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element.

Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *See* TEX. R. EVID. 503(b)(1). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *id.*, meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5). Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no pet.). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state the submitted e-mails and letters in Exhibit B consist of privileged attorney-client communications that were made between employees and representatives of the city, city attorneys, outside legal counsel, and the Texas Municipal League Intergovernmental Risk Pool for the purpose of rendering professional legal services to the city. You further state the handwritten notes in Exhibit B-1 memorialize attorney-client communications. You state these communications were intended to be and have remained confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information we have marked in Exhibit B and the handwritten notes in Exhibit B-1. Accordingly, the city may generally withhold this information under section 552.107(1) of the Government Code. We note, however, some of the otherwise privileged email strings in Exhibit B include communications with non-privileged parties. To the extent the communications with these non-privileged parties, which we have marked, exist separate and apart from the email strings in which they appear, the city may not withhold the communications with the non-privileged parties under section 552.107(1). Additionally, we find the city has failed to demonstrate how the remaining documents in Exhibit B consist of communications between privileged parties for the purpose of rendering professional legal services to the city. Therefore, the city has failed to demonstrate the applicability of the attorney-client privilege to the remaining information in Exhibit B and may not withhold this information under section 552.107(1) of the Government Code.

Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This exception encompasses information other statutes make confidential. Section 154.073 of the Civil Practice and Remedies Code provides in relevant part that:

(a) Except as provided by subsections (c), (d), (e), and (f), a communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure, whether before or after the institution of formal judicial proceedings, is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding.

(b) Any record made at an alternative dispute resolution procedure is confidential, and the participants or the third party facilitating the procedure may not be required to testify in any proceedings related to or arising out of the matter in dispute or be subject to process requiring disclosure of confidential information or data relating to or arising out of the matter in dispute.

Civ. Prac. & Rem. Code § 154.073(a), (b). In Open Records Decision No. 658 (1998), this office found that communications during the formal settlement process were intended to be confidential. *See* Open Records Decision No. 658 at 4; *see also* Gov't Code § 2009.054(c).

You state portions of the communications in Exhibit B were made pursuant to a mediation held by an impartial third party as a result of a dispute between the city and the named individual. Upon review, we agree portions of the information in Exhibit B, which we have marked, consist of communications relating to the subject matter of the dispute made by a participant in an alternative dispute resolution procedure or a record made at such a procedure. Accordingly, we find the information we have marked is confidential under section 154.073 of the Civil Practice and Remedies Code and must be withheld under section 552.101 of the Government Code. However, we find none of the remaining information consists of a communication relating to the subject matter of the dispute made by a participant in an alternative dispute resolution procedure or a record made at such a procedure. We therefore conclude the remaining information in Exhibit B is not confidential under section 154.073 and may not be withheld on that basis under section 552.101 of the Government Code.

Section 552.111 of the Government Code excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” Gov't Code § 552.111. This exception encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines work product as:

(1) [M]aterial prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or

(2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5(a). A governmental body seeking to withhold information under this exception bears the burden of demonstrating the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. *Id.*; ORD 677 at 6-8. In order for this office to conclude that the information was made or developed in anticipation of litigation, we must be satisfied that:

a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

Nat'l Tank Co. v. Brotherton, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204; ORD 677 at 7.

You claim the remaining documents in Exhibit B are protected by the attorney work product privilege. You state this information pertains to pending litigation as a result of a dispute between the city and the named individual. You also state the information in question reveals the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative. However, upon review, we find the remaining information in Exhibit B was sent to or received by non-privileged parties. Therefore, the city has failed to establish how the work product privilege is applicable to the remaining information in Exhibit B. Accordingly, none of the remaining information in Exhibit B may be withheld under section 552.111 of the Government Code on the basis of the attorney work product privilege.

Section 552.102(a) of the Government Code excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). The Texas Supreme Court has held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). Upon review, the city may withhold the information we have marked in Exhibit C under section 552.102(a) of the Government Code.

We note portions of the remaining information may be excepted from disclosure under sections 552.117 and 552.137 of the Government Code.⁵ Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for information is made. *See* Open Records Decision No. 530 at 5 (1989). Information may only be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date on which the request for information was made. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who did not timely request confidentiality under section 552.024. We have marked information in the remaining information that may be subject to section 552.117. Therefore, to the extent the individuals whose information is at issue timely requested confidentiality under section 552.024, the city must withhold the marked information under section 552.117 of the Government Code. To the extent the individuals did not make a timely election under section 552.024, the city may not withhold the marked information under section 552.117 of the Government Code.

Section 552.137 excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of the type specifically excluded by subsection (c). Gov't Code § 552.137(a)-(c). The e-mail addresses we have marked are not of the types specifically excluded by subsection 552.137(c). Accordingly, the city must withhold the e-mail addresses we have marked under section 552.137 of the Government Code unless the owners of the addresses affirmatively consent to their release.

In summary, the city may withhold the handwritten notes in Exhibit B-1 and the information we have marked in Exhibit B under section 552.107(1) of the Government Code. However, if the non-privileged portions of the email strings in Exhibit B, which we have marked, exist separate and apart from the privileged e-mail strings in which they were included, the city may not withhold them under section 552.107(1). The city must withhold (1) the information we have marked in Exhibit B under section 552.101 of the Government Code in conjunction with section 154.073 of the Civil Practice and Remedies Code, (2) the information we have marked in Exhibit C under section 552.102(a) of the Government Code, (3) the information we have marked under section 552.117(a)(1) of the Government Code to the extent the individuals whose information is at issue timely requested confidentiality

⁵This office will raise sections 552.117 and 552.137 on behalf of a governmental body, as these sections are mandatory exceptions to disclosure. *See* Gov't Code § 552.007, .352; Open Records Decision No. 674 at 3 n. 4 (2001) (mandatory exceptions).

under section 552.024, and (4) the e-mail addresses we have marked under section 552.137 unless the owners consent to their release. The remaining information must be released.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,

A handwritten signature in cursive script, appearing to read "Kristi L. Wilkins".

Kristi L. Wilkins
Assistant Attorney General
Open Records Division

KLW/sdk

Ref: ID# 450817

Enc. Submitted documents

c: Requestor
(w/o enclosures)